"it is *undisputed* Hart had struck two deputies during the escape . . . and was a constant threat of harm to everyone in the vicinity . . ." (Opposition Brief, at p. 16) (emphasis supplied). Contrary to Respondents' assertion, the evidence in this case reveals that no officers were struck--or even grazed--by Hart's vehicle. Indeed, several of the SWAT officers acknowledged that no one was struck by the vehicle. (D.E. 152, Ex. 24 [Investigative Report] at SSO650 ["Butsch states he stepped out of the way and saw Mike Kennedy jump out of the way."]; D.E. 152, Ex. 114 [Mercurio Depo.] at 18:22-18:24; D.E. 152, Ex. 118 [Pollack Depo.] at 22:8-22:10 (stating that he did not see the vehicle strike any officers); D.E. 152, Ex. 103 [Butsch Depo.] at 74:7-76:2 & 82:21-82:24 [testifying that he did not observe any SWAT officer struck by the vehicle as it was moving in the driveway or across the front yard]; D.E. 152, Ex. 113 [McElyea Depo.] at 75:25-76:2 & 87:25-88:3 [acknowledging that he did not see any SWAT officer "struck" by the vehicle]; D.E. 152, Ex. 117 [Pezzella Depo. at 21:19-21:21 [acknowledging that he was able to "jump out of the way" of the vehicle]).

Regardless, even if any of the SWAT officers were struck or "grazed" by Hart's vehicle during its initial back-and-forth maneuvering in the driveway, such alleged contacts occurred well **before** the point in time that Bauer and Gooding applied deadly force. As recognized in the District Court's Opinion, the purported striking of the two officers took place during the initial driveway encounter. (Petition Appendix 29a-31a). However, Bauer and Gooding did not fire their weapons until **after** the vehicle had already pulled out of the driveway and turned left into the front yard. (*Id.*). Thus, the alleged danger to the officers had already passed.

The mere fact that there may have been a threat to a law enforcement officer at an earlier point in time does not give Bauer and Gooding the right to shoot Hart for the duration of the incident. When the alleged threat passes, so

does the right to use deadly force. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) ("Even assuming Raso was in front of the car and was in danger at some point, a jury could find, notwithstanding her testimony, that she did not fire until it was no longer objectively reasonable for her to believe she was in peril. A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) ("'When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot any time thereafter impunity."). Since it is undisputed that Bauer and Gooding fired their weapons only **after** the point in time that the other two officers were allegedly grazed by the vehicle during the initial driveway encounter, they did not retain the right to shoot any time thereafter with impunity.

CONCLUSION

For the foregoing reasons, and for those stated in their original Petition, Petitioners Dianne Troupe and Leon Waiters, Jr. respectfully request that the Supreme Court of the United States grant their petition for writ of certiorari.

Respectfully submitted,

DANIEL L. WALLACH
(Counsel of Record)
STEVEN B. LESSER
BECKER & POLIAKOFF, P.A.
3111 Stirling Road
Fort Lauderdale, Florida 33312
Telephone: (954) 987-7550
Facsimile: (954) 985-4176

Attorneys for Petitioners